BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Introductory Comment.

Counsel for Petitioners are satisfied that a Brief and Argument, in support of this Petition for Certiorari, in the ordinary legalistic fashion and pattern, would not be helpful to the Court in this case. But by the same token, Counsel believe that some comment, partly legal and partly factual, might be of assistance to the Court. We will accordingly restrict ourselves in this Brief to such commentary as we think is called for in the premises.

Significance of the Case.

If this case is taken by this Court, the prompt decision of it should result, in a practical way, in determining whether several million Service men and women, who are serving overseas in the Armed Forces of the United States, will be permitted to vote at the coming Presidential and Congressional elections in November; or whether, for all practical purposes, they will be disfranchised at that election. That this is not a wild statement or loose charge, we will now try to show by suggesting certain convincing reasons for that proposition.

In the first place, it must be remembered that Congress enacted the Soldiers Voting Act of 1944 (U. S. C. A., Title 50, Secs. 301 *et seq.*) as a War Emergency measure; and provided for the so-called Federal Ballot after long and full discussion. Congress, therefore, must have been convinced that a large proportion of the overseas troops could not vote under the so-called "State Ballot" plan, else Congress would not have acted as it did. In other words, we

have a legislative finding by Congress itself that the use of the Federal Ballot is necessary in the present emergency, if the right of the overseas troops to vote in the coming election is to be adequately provided and protected.

The second consideration is the fact that the so-called "absentee voting laws" of the various States of the Union were, as this Court knows, never designed or intended for the enormous emergency task of providing a means of voting (by individual mail) for several million absent voters who are temporarily in the Armed Forces of the United States and scattered all over the world. Those laws, as the Court knows, are, many of them, rather antiquated legislative provisions, originally designed to permit a relatively small number of civilians to vote by mail, *who are earnest enough to go through the long red tape required to vote.* These State "absentee voting laws" are not in any sensible or realistic sense entitled to be called "Soldier Voting Laws." On the contrary, they are merely a variegated assortment of *peace-time* laws, designed for a very different purpose. In a few States these laws have been tinkered with, recently, in some minor respects, for the purpose of leading the public to believe that they will permit sensible and realistic Soldiers Voting. We say they will not do that; but on the contrary, that these State laws will break down completely when put to the enormous task of trying to provide a method of voting, *by mail,* for 10 or 11 million Wartime Voters. Even in those States like Illinois, where these laws have been recently modernized and simplified, *at least four trans-ocean mail trips* are required before the ballot of the individual soldier finally arrives at the local precinct voting-booth, where it must get before it is counted. We say further, that hundreds of thousands of soldiers' ballots will in a sense, "die aborning," because (like all soldiers' mail at the battle fronts) they will inevitably and

unavoidably be clogged and mislaid and delayed in Company and Regimental headquarters all over the world until it is too late for them to be counted. Any soldier who has ever served over-seas (as both the Counsel for Petitioners have done) knows that this latter unfortunate fact is serious and is true.

The third reason why voting by "State Ballots" will not work with the several million overseas soldiers and sailors, is a psychological reason. Any person who served in the First World War, in France, and indeed, any person who is familiar with the mental processes of a soldier at the front, knows at once that few of them will go through the discouraging red-tape which is unavoidable under the "State Ballot" system, before a ballot can be secured and voted. The soldier at the front whose right to vote requires *four trans-ocean mail trips* before his ballot gets back home will throw the whole thing up in disgust. He simply will not submit to what he thinks is a gross discrimination against him in this matter of voting.

Evidence of the 1942 Election.

Over and above these three convincing reasons, there is a fourth consideration: namely, the clear evidence of Soldiers' Voting in the 1942 Congressional elections. At those elections the State "absentee voting laws" were available in substantially the same form as they are today. There was, however, no Federal ballot permitted at that election. The Census Bureau has published "A Study of Soldiers' Voting" at the Congressional elections two years ago. The result of that study shows that only 28,051 "effective ballots" were received in the entire United States, although at that time there were approximately 2½ million men in uniform and away from their usual places of residence. That means that only 1 per cent, approximately, of the soldiers and sailors who were in the Armed Forces at the time of the Congressional elec-

tions two years ago were able to vote under the so-called "State Ballot" system. These facts were known to Congress when the 1944 Federal Wartime Voting Act was passed.

In Illinois, with which Counsel in this case are most familiar, there were more than 250,000 Service men and women in the Armed Forces at the time of the 1942 Congressional elections. In spite of much effort by public officials and public opinion generally, in Illinois, to get out the vote, there were only 4,447 "effective ballots" received in the entire State of Illinois. That is less than 2 per cent of the vote of the men and women in uniform at the time of that election.

We therefore say that the overseas troops *cannot effectively vote under the "State Ballot" system.* We have had that fact proved under our statute in Illinois. As far as the overseas troops from Illinois are concerned, our State "absentee voting law" has been well called a *"Soldiers can't vote Law."* We therefore say again that the votes of millions of service men and women, overseas, depend on the outcome of this case.

Discrimination as Between States.

One of the best-known provisions of the Fourteenth Amendment is found in Section 1 thereof, which reads as follows:

> "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

The Complaint charges, and it is not denied, that about 25 States of the Union have officially taken steps to permit the use of the Federal Ballot. The defendant, as Governor of Illinois, has refused to permit Illinois to join that list of States. Here is a clear discrimination by the State of Illinois which does violence to the spirit, if not

indeed also to the letter, of the above Constitutional provision.

What, then, will be the realistic result of that discrimination in the camps and posts of the Army all over the world and on the ships and in the naval posts of the Navy all over the world? On some particular day before the November, 1944, election, the Commanding Officers of each of those camps and posts and ships and naval stations will announce that Federal Ballots are available for all servicemen desiring to vote them, who are entitled to vote them. On that day the service men, say from Indiana and Michigan and Pennsylvania and Massachusetts, and many other of the leading and progressive States of the Union, will form in line and come to the voting-booths set up for the purpose and receive a Federal Ballot; and after voting it he will turn it back to the voting-officers who have been delegated to collect and return them, in bulk, to the United States War Ballot Commission in Washington, for delivery in turn, to the Secretaries, of State in the various States. (For there is no *voting by mail* under the Federal Wartime Ballot system; on the contrary the Federal Ballots are given to the troops at the front; and after they are voted they are collected and returned home in bulk by the War Department or the Navy Department, as the case may be.)

But when the soldier or sailor from the State of Illinois who will be in line to vote comes before the voting-officer in his particular post or camp or ship, he will be ordered to step out of line, and will be told that he cannot vote the Federal Ballot. If he asks the reason, the voting-officer will have to tell him—

> "The Governor of your State has refused to permit the use of this ballot."

If he investigates the matter further, he will find that the law forbids the Secretary of War or the Secretary of the

Navy (as the case may be) to give him a ballot under those circumstances. Here then is a discrimination between the States that may receive little thought or attention until it actually takes place in hundreds of thousands of instances in the Army and Navy camps and posts all over the world. But if that discrimination is permitted to happen (as it is bound to do if the present state of affairs persists), we predict that much will be heard about it after it has happened, and in the days to come.

The Verdict of History.

In Nocolay and Hay's "*Life of Lincoln*," and in the other authentic history-books about the Civil War, we read about the shameful role which the State of Illinois played in the matter of Soldiers' Voting in 1864. The "Copperhead" legislature of that State (over the objection of a loyal war Governor of that time, and over the objection of a great majority of public opinion in the State) refused to permit Illinois soldiers to vote in the fields and camps of the Army, as was done by other States for their soldiers and sailors. These plaintiffs and their counsel fervently hope that the history-books of the future will not be compelled to record a similar verdict of history, and to say that Illinois in 1944, in the Second World War, followed the footsteps of the "Copperhead" legislature of Illinois in 1864.

The Way of Democracy—Honest Elections.

We say that the way of Democracy is not that way. We say that the American idea of Democracy forbids such discrimination. We say that the Federal Ballot is either legal and valid everywhere, including Illinois, or it is invalid everywhere. The Union cannot be a "house divided against itself" on this point.

We say this honorable Court is the only Forum in which that question can be settled. It is arguable (although we believe it is most unlikely) that this Court might hold the Federal Ballot unconstitutional, as the defendant in this case asserts it is in Illinois. We on behalf of the Petitioners are willing to stand or fall on that proposition. Lincoln said that the Union could not survive "half slave and half free." We use that figure of speech about the Federal Ballot. We say that an honest election, for President and for Congress, cannot be held in November with the Federal Ballot legalized and authorized in half the States (or thereabouts), while that Ballot is rejected and not permitted to be used by millions of Service men and women in the rest of the States.

So much for the larger aspects of this case. We come now to certain particular aspects of it, which we think also deserve some comment.

A Case of Nation-wide Interest.

The case at bar is the first and only case in the entire country (so far) in which the validity and construction of the much-disputed Federal Soldiers Voting Act of 1944 has been submitted to the courts for interpretation, in the usual American fashion. Moreover, we believe that the procedure adopted in the Complaint below (that is, the Declaratory Judgment process), is the only method by which certain disputed questions arising in that Act can be lawfully decided in advance of the elections and in time to be of any real help in administering that Act throughout the country.

The District Court met the issues presented to it in the Complaint by a flat judgment denying its jurisdiction both over the defendant Governor personally and over the subject matter of the Complaint. The Circuit Court of Ap-

peals affirmed that judgment after a summary hearing and oral argument, but did so "without opinion." By so doing the latter court expedited the case on its way to a possible hearing before this Court at a time when a few days saved might be highly desirable. Nevertheless, the practical result is that the bar of the country, and, indeed, those who are charged with administering this important Act of Congress, are entirely without any judicial opinion in this case as to the validity or the construction of that Act. We submit, therefore, that a decision by this Court in the premises is highly desirable, not only to the 10 or 12 million Service men and women who will be affected by it, but also to the nation as a whole.

The Question of the Constitutionality.

Counsel for the defendant (the Attorney General of Illinois), in his argument both in the District Court and in the Circuit Court of Appeals, frankly based his moral defense of the attitude and conduct of the defendant Governor in this case on the bald contention that the Federal Ballot was "unconstitutional and invalid" in Illinois, and that its use was "expressly prohibited" by the laws of that State. (See also the express statements of counsel for the defendant to that effect in "Opinions of the Attorney General of Illinois," June 13, 1944, addressed to Governor Dwight H. Green, entitled, *Voting by Persons in the Military Service.*)

We accepted that challenge in our argument in the District Court and in the Circuit Court of Appeals, and respectfully say that such will be the major question before this Court if this Petition is allowed. The fact is that the Complaint below was chiefly bottomed on that particular legal issue of constitutionality.

When we strip the arguments presented in this case,

pro and *con*, of all their nonessentials, one question is boldly posed by the Complaint, namely: Can the defendant, even as Governor of Illinois, by a mere *fiat* declaration, say that the Federal Soldiers Voting Act is unacceptable and invalid in that State, and thereby deprive more than 300,000 Illinois citizens of the right to use and vote the Federal Ballot, on his mere *ipsi dixit* that the use of such ballot is "unconstitutional" when the use of that ballot has been and will be permitted and authorized in more than 25 other States of the Union?

When Congress saw fit to pass that Act and stated in its title that the Act was designed "to facilitate voting in time of war," Congress gave a clear intention to assist the members of the armed forces of the United States in their difficult tasks of voting in all Federal elections. Since the question of the right to vote can, of itself, not be challenged, the only question which is here open is this: Does the method provided by Congress "to facilitate voting in time of war" actually achieve that purpose, and is that purpose consistent with the provisions of the Federal Constitution?

The Matter of Time.

When the plaintiffs below asked the Federal Courts below to decide that question, there was ample time to have it decided in advance of the election, in a fashion that would be helpful to all those concerned with the Act. The fact is that the War Department and the Navy Department have already printed and provided several million Federal Ballots and have actually distributed such ballots in bulk to the commanding officers of the Army and Navy in all parts of the world. Those Federal Ballots would be instantly available for distribution and voting—even by those members of the armed forces, such as the citizens of Illinois, who down to this time have been denied the use of the

Federal Ballots. *They could vote that Ballot, even overseas, as late as say the forepart of October, and it still would be returned in time to be counted on November 7, 1944.*

We respectfully say, therefore, that a decision by this Court, during the early part of the October term, if it upheld the validity and constitutionality of the Federal Ballot, would instantly release those ballots for voting all over the world for Illinois servicemen (as well as similarly situated servicemen from other States) who desire to vote the Federal Ballot and who had not been able to vote the so-called State Ballot.

The Effect of Constitutionality or Unconstitutionality.

We therefore respectfully ask this Court to say in clear and unambiguous language whether the so-called Federal Ballot is, or is not, Constitutional. There can be only two answers, Yes or No, to that question. We wish to analyze, in summary fashion, the effect of both of those answers, which we now do.

A. If this Court should declare that the Federal Ballot is Constitutional in Illinois, the effect would be (obviously) to validate the use of the Federal Ballot everywhere, regardless of the State from which a particular service man might come.

The defendant here, in his Reply-telegram to the President (Tr. 30) and in his argument in this case, challenges the validity of the Federal Ballot, and its usefulness, in Illinois. Thereby the defendant takes the position that an Act of Congress, passed for the War Emergency, which has been accepted and recognized as valid and Constitutional in at least 25 States of the Union, may be disavowed and held to be "unconstitutional" and nugatory, in a particular State, *and by the mere fiat of a State Governor.*

It appears to us as elementary that such a conflict between the States of the Union cannot justly and lawfully be permitted to exist, or to continue. A valid Federal statute remains constitutional, and becomes

"the law of the land" in spite of the opinion to the contrary of a State Officer who happens to be a State Governor. The discrimination as to voting rights in the various States which now exists under this Act of Congress is unprecedented in the entire history of the United States. If permitted to continue, and to spread, that discrimination, affecting as it is bound to do, several million American citizens, in the Armed Forces, is sure to result in, and to produce, a National Scandal of serious proportions.

There is surely no precedent in the history of the United States for such a proposition or such a situation. It cannot be that public opinion (and the judgment of fair and reasonable men) has so far realized or comprehended the foreboding social and political results that are bound to follow in the wake of such serious and widespread discrimination over the right to vote for President and Members of Congress. We conclude this point by quoting the classic words of Cicero when in a situation not entirely without pertinency here, he said, *"O Tempora! O Mores!"*

B. But for the sake of argument, let us assume (contrary to our convictions and our expectations) that this Court might hold the Federal Wartime Voting Act of 1944 (or some major provisions of it) to be unconstitutional, thereby prohibiting the use of the Federal Ballot for the citizens of all the States, everywhere in the world. Could this defendant, in such event, conceivably reverse his own opinion, and declare the Federal Ballot valid and proper in the State of Illinois? If that proposition sounds absurd, it is no more so than the converse of that proposition—which is the main contention of the defendant in this case.

The fact is, of course, that since this controversy (and this widespread discrimination) has now become nation-wide, and threatens to range State against State, in this grave matter of soldiers voting, there is only one way in which these conflicting theories and ideas can be made uniform and reconciled, one with the other. That way is by a final decision of this Court. If this Court should hold the

Federal Ballot valid and proper in the State of Illinois, this defendant, we strongly believe, will gladly and faithfully abide by that decision. And the Governors of the other States who have taken sides with the defendant will do likewise.

We therefore respectfully say this Court should allow this Petition and take this case for emergency hearing and disposition at an early date.

The Role of Counsel for Petitioners.

Counsel for Petitioners are presenting this case not solely on behalf of the rights of their individual clients; but also on behalf of the several million American citizens, in the Armed Forces of the United States, who likewise have been adversely affected by the things charged in the Complaint below. Counsel seek to present these important questions to the Court in a *pro bono publico* capacity. They feel that in so doing they have performed, in some slight measure, a civic duty.

And now having presented the matter to the Court to the best of their abilities, they will leave the matter to the Court.

Respectfully submitted,

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